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Supreme Court, U.S.
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No. 94-590

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

v.

WAYNE and JUDY ACTON, guardians ad litem for JAMES ACTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.1

Petitioner is not a corporation and has no parent companies, subsidiaries or affiliates.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introduction

The central issue presented to this Court is whether the Ninth Circuit erred in applying a "compelling interest" test to the Petitioner's drug-testing policy. This Court should grant certiorari because there is a conflict between the Ninth Circuit's opinion and the Seventh Circuit, which applied a "substantial interest" test and upheld random drug testing under "very similar" circumstances. 23 F.3d 1514, 1527 (Pet. App. at 62a). Moreover, this Court should grant certiorari to resolve the unanswered question in *New Jersey v. TLO*, 469 U.S. 325 (1985), concerning the appropriate standard for searches in a school setting in the absence of individualized suspicion.

1. **The Petition for Writ of Certiorari Contains No Misstatements of Fact.**

Contrary to Respondents' contention, the Petition contains no misstatements of fact. As noted in the Petition, the facts were taken primarily from the findings of fact made by the district court. (Pet. at 4, n. 1). The specific facts Respondents contest are supported directly by findings of that court or the Ninth Circuit. The Ninth Circuit expressly found no clear error in the district court's findings. 23 F.3d at 1519 (Pet. App. A at 20a).

In *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1985), this Court held:

> The Court of Appeals rejected petitioner's position that it should set aside many of the District Court's findings as clearly erroneous. In accord with our usual practice, we must now accord great weight to a finding of fact which

> has been made by a district court and approved by a court of appeals.

468 U.S. at 98, n. 15. That is exactly what happened here. Respondents argued to the Ninth Circuit that the district court relied on inadmissible hearsay and that there was no evidence of an actual drug problem in the Vernonia Schools. The Ninth Circuit rejected those arguments. 23 F.3d at 1519 (Pet. App. A at 18a-20a). In an attempt to muddy the waters to avoid certiorari, Respondents once again raise questions about the facts which have long since been settled.[1]

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[1] Respondents say it is "curious" that Petitioner relies on facts found in the district court opinion since that opinion was reversed. (Resp. at 4, n. 1). That is irrelevant. The Ninth Circuit reversed the district court's holding on the law. It accepted the district court's findings of fact. *See, United States v. O'Donnell*, 303 U.S. 501, 508 (1938) (although the circuit court reversed the district court's holding, this Court refused to reexamine the evidence

2. This Court Should Grant Certiorari Because the Ninth Circuit's Opinion Presents a Federal Question and No Risk of an Advisory Opinion Exists.

Respondents claim that this case was decided solely on state law grounds (Resp. at 21) and that a decision by this Court might be an advisory opinion (Resp. at 22). Although stated as separate arguments, Respondents' positions are based on the assertion that the Ninth Circuit's decision rests solely on Article I, Section 9 of the Oregon Constitution. Respondent's arguments in this regard are flawed in two respects.

First, the Ninth Circuit's conclusion that the Policy violates the Oregon Constitution is premised *exclusively* on its conclusion that it violates the Fourth Amendment. The majority specifi-

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where the two lower courts made concurrent findings).

cally stated that: "in the specific area of urine testing - the core issue in this case - we will unabashedly refer to federal law and decide this case based on the Fourth Amendment." 23 F.3d at 1519 (Pet. App. A at 17a-18a). Likewise, Judge Reinhardt noted that "there is no way to 'avoid' a federal constitutional holding in this case" and that "our decision is based almost exclusively on the application of federal law." 23 F.3d at 1527 (Pet. App. A at 66a). In fact, Judge Reinhardt went so far as to say: "Any attempt to limit our decision to Article I, Section 9 would be sheer flimflammery". 23 F.3d at 1519 (Pet. App. A at 69a). Thus, this case raises an important federal constitutional question which is appropriate for this Court to review.

Second, an opinion by this Court would not be an impermissible advisory opinion because, to the extent the Ninth Circuit's decision is based on the Oregon Constitution, that decision was dictated by the court's interpretation of the Fourth Amendment. Thus, an opinion by this Court that the Ninth Circuit erred in interpreting the Fourth Amendment would render the Ninth Circuit's judgment invalid and, hence, would not constitute an advisory opinion.

Respondents maintain that such an opinion would nonetheless be advisory by asserting the purely speculative argument that the Oregon Constitution theoretically could later be interpreted differently from the federal constitution. (Resp. at 23-24). This Court, however, rejected such an argument in the analogous case of

Michigan v. Long, 463 U.S. 1032 (1983). In granting review in *Long* this Court stated:

> Even if we accept that the Michigan Constitution has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law.

463 U.S. at 1044.

Similarly, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), this Court held:

> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on [state] law, it appears that at the very least the [state] court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases, and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of [state]

> law. . . . If the [state supreme court] 'held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide . . . these suits according to its own local law.'

433 U.S. at 568 (citations omitted).

Thus, this Court has held in *Long*, *Zacchini* and *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), that review should be granted to decide federal issues, even where a question exists as to whether a lower court decision rested exclusively on federal grounds, and even where a different state constitutional ground might later be asserted. In the instant case, no question exists that the Ninth Circuit's decision at a minimum "rested . . . primarily on federal law." *Long*, 463 U.S. at 1044. Indeed, Respondents concede this in asserting that "[t]he Court of Appeals concluded that

the District's drug testing policy violates the Fourth Amendment and, *therefore*, that it must also violate Article I, section 9, of the Oregon Constitution . . . ." (Resp. at 22-23). (Emphasis added). There is no question that this Court has jurisdiction and should grand review.

3. **<u>An Important Conflict Exists Among the Circuits as to the Standard Applicable to Random Searches in a School Setting</u>**.

Respondents claim there is no conflict among the circuits on the issue presented for review. (Resp. at 28). As the Ninth Circuit found, there is a clear conflict between the Seventh's decision in *Schaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988) *reh'g denied* (1989) and its own decision. 23 F.3d at 1527 (Pet. App. A at 62a-63a). Respondents nonetheless ar-

gue that *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) essentially overrule the Seventh Circuit's decision in *Schaill*. Respondents argue:

> There is no reason to believe that the *Schaill* court, writing today, post-*Skinner* and -*Von Raab*, and applying a compelling-interest test rather than a substantial-interest test, would reach a different conclusion. (Resp. at 35).

To the contrary, there is no reason to believe that the *Schaill* court, writing today, would apply a compelling-interest test rather than a substantial-interest test in the school setting. *Skinner* and *Von Raab* do not address the constitutional standard applicable to random drug testing in the school setting. *Skinner* and *Von Raab* only establish the standard for such tests in the workplace. Further, *Skinner* and *Von Raab* cannot be read to overrule *New Jersey v. TLO*, which held that the school setting requires an "easing" of Fourth Amendment restrictions and a "degree of flexibility" in the school setting. 469 U.S. at 339-340.

Thus, it is not surprising that the Seventh Circuit has cited *Schaill* since this Court's holdings in *Skinner* and *Von Raab* without casting any doubt on its validity. In fact, the Seventh Circuit, sitting *en banc*, said *Schaill* was based "on the idea that the Fourth Amendment applies with diminished force in the schools." *Dimeo v. Griffin*, 943 F.2d 679, 685 (7th Cir. 1991) (Pet at 26, n. 12). The Seventh Circuit thereby recognized that a lessor standard applies in schools than in the workplace context of *Skinner* and *Von Raab*.

4. The Issue in this Case will Continue to Vex Lower Courts and School Officials.

Respondents incorrectly assume that the issues raised by the Petition would only have bearing on random drug testing in schools. (Resp. at 37). As noted in the Petition, Petitioner is asking this Court to decide the constitutional parameters of suspicionless searches of any type in the school setting. (Pet. at 28). This Court expressly left this issue unanswered in *TLO* and should now decide it.[2]

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[2] Petitioner is aware of at least one pending case, *Moule v. Paradise Valley Unified School District No. 69*, __ F. Supp. __, 1994 WL 503429 (D. Ariz. 1994), dealing with random drug testing in high schools, decided on the basis of the Ninth Circuit's holding in *Acton*. Petitioner is advised that the school district has filed a notice of appeal to the Ninth Circuit.

5. The Issue for this Court is Not Whether the Ninth Circuit Improperly Applied *Skinner* and *Von Raab* to the District's Policy.

Respondents claim that Petitioner is only dissatisfied "with the way the Ninth Circuit applied the *Skinner* and *Von Raab* guidelines to the particular facts of this case." (Resp. at 41-42). That is incorrect. The important issue Petitioner asks this Court to review is the Ninth Circuit's application of a compelling-interest test without taking into account the requirement of *TLO* that Fourth Amendment requirements be eased and that there be a "degree of flexibility" in the school setting.[3]

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[3] Petitioner also challenges the Ninth Circuit's holding that schools do not have a compelling interest in safeguarding and educating students. (Pet. at 38).

6. **<u>This Court's Decisions in *Skinner* and *Von Raab* Have Not Decided the Issue Presented for Review</u>.**

Respondents concede that school children can be searched without individualized suspicion of wrongdoing in light of *Skinner* and *Von Raab*. (Resp. at 44). However, Respondents incorrectly assert that courts should apply a compelling interest test to random searches in public schools. (Resp. at 43-44). As noted above in Section 3, neither *Skinner* nor *Von Raab* established standards for searches in schools. (*Supra*. at 10). Further, they do not discuss or elucidate the effect of the *TLO* holding that Fourth Amendment requirements must be eased in the school setting. In the school setting, *TLO* clearly requires some standard less than the compelling interest standard this Court appeared to utilize in

the workplace setting in *Skinner* and *Von Raab*. This Court should, therefore, decide exactly what that lessor standard is.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: November 18, 1994.

Respectfully submitted,

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